

April 30, 2018

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System

Dear Ms. Misback:

The American Bankers Association¹ (ABA) appreciates the opportunity to comment on the Federal Reserve's proposed amendments to its Guidelines for Appeals of Material Supervisory Determinations (Amended Guidelines) and its Policy Statement Regarding the Ombudsman.² We understand that the Amended Guidelines are intended to expedite the appeals process to reduce the levels of appeal, establish consistent standards of review, and provide transparency to the appeals process by making final appeal decisions public. Similarly, the proposed changes to the Policy Statement Regarding the Ombudsman are intended to clarify and formalize certain practices in place while emphasizing the Ombudsman's availability to resolve certain concerns before they become formal appeals.

Overall, these amendments are a welcome step towards greater standardization and transparency in the appeals process, and we encourage the Federal Reserve to continue this important work. ABA understands that many exam issues are resolvable through less formal action than an appeal, but we believe that the ability to initiate an appeal that will be fairly considered is a critical part of a balanced supervisory regime, an essential check on examiner excesses. These proposed amendments are helpful and directionally important. Notwithstanding that, we believe that more may have to be done to make the appeals process one that financial institutions trust and have confidence using. One review of the Federal Reserve's exam appeals process revealed that from 2001 to 2012, only 25 appeals were received by the Federal Reserve System, and only two of these appeals reversed the findings of the bank examiners.³ This lack of confidence in the appeals process is a problem that needs to be addressed.

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² See Internal Appeals Process for Material Supervisory Determinations and Policy Statement Regarding the Ombudsman for the Federal Reserve System, 83 Fed. Reg. 8,391 (February 27, 2018). Available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-02-27/pdf/2018-03907.pdf>

³ See Julie Andersen Hill, When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations, 92 Wash. U. L. Rev. 1101, 1138. (2015). Available at: http://openscholarship.wustl.edu/law_lawreview/vol92/iss5/5

Recent bipartisan legislation passed in the House of Representatives offers reasonable and balanced ideas to build a more independent exam review process.⁴ ABA would encourage the Federal Reserve to use its existing statutory powers to incorporate elements of this legislation wherever possible to further enhance its existing exam appeals process.

In response to the Amended Guidelines, we offer some specific suggestions for consideration.

Add Matters Requiring Attention to the List of Items Eligible for Appeal

This is not a new issue. In 1994, the Federal Reserve Board (FRB), Office of the Comptroller of the Currency (OCC), and Federal Deposit Insurance Corporation (FDIC) were required by the Riegle Community Development and Regulatory Improvement Act (Riegle Act) to establish an independent intra-agency appeals process for material supervisory determinations. The agencies crafted guidelines outlining their exam appeal processes shortly after the Riegle Act was enacted.

In recent years, both the OCC and FDIC have revised their guidelines, and both have opted to clarify that matters requiring attention (MRAs) are appealable. In 2013, the OCC's revised exam appeal guidelines made it clear that a bank could appeal "material supervisory determinations such as matters requiring attention, compliance with enforcement actions, or other conclusions in the report of examination."⁵

In 2017, the FDIC, following a notorious public example of examiner excess that failed redress under its appeals program, also proposed to revise its exam appeal guidelines.⁶ ABA sought a change to the proposed guidelines to ensure that "matters requiring board attention" would be listed as a material supervisory determination eligible for appeal.⁷ In publishing its final guidelines, the FDIC included this change.⁸

In its Guideline Amendments, the FRB has not added MRAs or matters requiring immediate attention (MRIAs) to its list of material supervisory determinations that are appealable. ABA recommends that it does so to maintain consistency among the agencies and to ensure that banks know they have an avenue of redress for erroneously issued MRAs or MRIAs.

Establish a Clear "De Novo" Review for the Initial Review Panel

The Guideline Amendments propose to set forth a consistent standard of review across the

⁴ See H.R. 4545 Financial Institutions Examination Fairness and Reform Act. 115th Cong. (2018).

⁵ See OCC Bulletin 2013-15, Banks Appeals Process. Guidance for Bankers. Available at: <https://www.occ.treas.gov/news-issuances/bulletins/2013/bulletin-2013-15.html>

⁶ See Guidelines for Appeals of Material Supervisory Determinations. Notice and Request for Comment. 81 Fed. Reg. 51441. Available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18507.pdf>

⁷ See ABA letter to FDIC re: Revisions to Guidelines for Appeals of Supervisory Determinations. October 03, 2016. Available at: <https://www.aba.com/Advocacy/commentletters/Documents/ABACommentLettertoFDIConRevisedGuidelinesforAppeals.pdf>

⁸ See FDIC Guidelines for Appeals of Material Supervisory Determinations. Available at: <https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html> Also see, Guidelines for Appeals of Material Supervisory Determinations. Notice of Guidelines. 82 Fed. Reg. 34522. Available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-07-25/pdf/2017-15466.pdf>

Federal Reserve System. This is a welcome change, as different Federal Reserve Banks have previously set their own standards of review. Even more concerning, certain Federal Reserve Banks permit their appeals panel to set forth whatever standard of review they would like to govern an individual appeal.⁹ Such inconsistencies in the standard of review across the Federal Reserve System, and even within certain Reserve Banks, increase the risk that banks appealing a similar erroneous exam finding in different parts of the country will receive different treatment in their appeal.

For this reason, ABA supports the Board's decision to set forth a consistent standard of review for appeals across the Federal Reserve System. However, ABA would ask that the Board provide some clarity as to the Initial Review Panel's proposed standard of review (Proposed Standard) expressed in the Amended Guidelines.

The Proposed Standard for the Initial Review Panel is that, "[t]he panel must consider whether the Reserve Bank's material supervisory determination is consistent with the Board's policies, consistent with applicable laws and regulations, and supported by the record. In doing so, the panel shall make its own supervisory determination and shall not defer to the judgment of the Reserve Bank staff that made the material supervisory determination..."¹⁰

The Proposed Standard has attributes of a de novo review in saying that it shall make its own supervisory determination and shall not defer to the judgment of the Reserve Bank staff.¹¹ This seems reinforced by the ability of the Initial Review Panel to use its discretion to conduct additional fact-finding.¹² However, the Board never calls the Proposed Standard a de novo review standard. This Proposed Standard sits in contrast to the more forthright standard of review currently in place at the Federal Reserve Bank of New York, which states that, "[t]he Review Panel will use a 'de novo' standard of review in reaching its decision."¹³

The tension between a de novo review and a lower standard of review is evident in the Federal Reserve Bank of Minneapolis' current appeal standard (Minneapolis Standard). The Minneapolis Standard is that, "[t]he standard for review will be whether the Reserve Bank's findings and conclusions were based on sufficient evidence and were consistent with Federal Reserve System policy. A completely new (de novo) review will not be undertaken."¹⁴ The Minneapolis Standard seems written to underscore that "findings and conclusions based on sufficient evidence that are consistent with Federal Reserve System policy" is a very different standard than de novo.

⁹ See Federal Reserve Bank of Kansas City. Procedures for Appealing Material Supervisory Determinations. ("The Appeal panel will determine administrative matters such as its standard for review."). Pg. 6.

Available at: <https://www.kansascityfed.org/publicat/banking/membership/smb/AppealProcedures.pdf>

¹⁰ See Amended Guidelines at 8,393.

¹¹ A de novo review is one that starts anew. It assures that the body hearing the appeal makes a fresh review that does not assume the accuracy of prior findings.

¹² See Amended Guidelines at 8,393. ("The panel may, in its discretion, conduct additional fact-finding.")

¹³ See Federal Reserve Bank of New York. Procedures for Appeals of Adverse Material Supervisory Determinations. Pg. 4. Available at:

https://www.newyorkfed.org/medialibrary/media/banking/pdf/appeals_procedures.pdf

¹⁴ See Federal Reserve Bank of Minneapolis. Procedures for Appealing Material Supervisory Determinations. Pg. 4. Available at: <https://minneapolisfed.org/~media/files/banking/srcappealsprocedures020114final.pdf?la=en>

Comparing these different Reserve Bank standards makes it difficult to discern the exact scope of the Proposed Standard. The first sentence of the Proposed Standard could be read to limit the scope of the Initial Review Panel to nothing more than the considerations listed.¹⁵ In some ways, the first sentence of the Proposed Standard parallels the Minneapolis Standard, albeit with different language.¹⁶ However, the second sentence of the Proposed Standard, combined with the Initial Review Panel's discretion to conduct fact-finding, points toward a broad and enabling standard of review.

The Amended Guidelines seem intent on offering appealing institutions a clearer, more consistent, and more robust standard of review than the past. To that end, ABA asks that the Board remove any ambiguity by setting forth a clear and unequivocal de novo standard of review for the Initial Review Panel, applicable throughout the system.

Protect Confidentiality When Publishing Appeal Decisions

In the overview section of the Federal Register notice for these Amended Guidelines, the FRB states that, "[i]n order to maximize transparency, the decision of the final review panel will be made public."¹⁷ In the Amended Guidelines, this is found in newly proposed Section (B)(18), which states that, "[a] copy of the [final review] decisions will be published as soon as practicable, and the published decision will be redacted to avoid disclosure of exempt information. In cases in which redaction is deemed insufficient to prevent improper disclosure, the published decision may be presented in summary form."¹⁸

We appreciate the FRB's recognition of the need to balance the need for greater transparency in the examination appeals process with the need to ensure that financial institutions that avail themselves of the exam appeals process receive confidentiality. ABA asks that the FRB take great care in its review of appealed decisions to ensure that summaries and published decisions cannot be used to identify individual institutions that have appealed. ABA further asks that such publication program include a dedicated webpage listing these summaries, making it easy for the public to find them.¹⁹

Further Empower Your Ombudsman

ABA has long advocated for empowering the Federal Reserve's Ombudsman in order to strengthen the exam appeals process. ABA offered specifics on ways to enhance that role in a letter dated January 30, 2008, which is enclosed for your convenience. In that letter, we reflect ABA's view that the power of the Ombudsman to overrule examiner decisions is a missing key

¹⁵ See Amended Guidelines at 8,393. ("The panel **must** consider whether the ... determination is **consistent with the Board's policies, consistent with applicable laws and regulations, and supported by the record.**") (emphasis added)

¹⁶ The Minneapolis Standard is based on "sufficient evidence" and consistency with Federal Reserve System policy. The Proposed Standard is based on consistency with the Board's policies, consistency with applicable laws and regulations, and support in the record.

¹⁷ See Amended Guidelines at 8,392.

¹⁸ See Amended Guidelines at 8,394.

¹⁹ For instance, the OCC publishes a list of the summaries on a dedicated page. See here: <https://www OCC.gov/topics/dispute-resolution/bank-appeals/index-bank-appeals.html>.

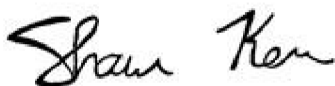
attribute to a better appeals process. We note that the Amended Guidelines are explicit in rejecting this approach, saying that “the Ombudsman will not have any substantive involvement in or act as a decision-maker with respect to the appeal.”²⁰ ABA believes that the Board should reconsider this view and empower the Ombudsman to be a decision-maker in the examination appeals process. There are few steps that the Board could take that would add as much credibility to its appeals program.

While the Amended Guidelines do expand upon the Ombudsman’s role in retaliation claims, the Amended Guidelines ultimately prevent the Ombudsman from making recommendations regarding disciplinary action for supervisors found to have retaliated.²¹ The Amended Guidelines clearly emphasize that examiner staff retaliation against supervised institutions for filing an appeal is unacceptable. However, the Amended Guidelines also make it clear that the Ombudsman has no power to exclude examiners that have retaliated from being a part of future examinations of that appealing institution. Instead, the Amended Guidelines leave that decision to the division director.

ABA recommends that the FRB empower its Ombudsman to make a decision as to whether an examiner should be excluded from future examinations on the grounds that the examiner has retaliated against that institution in the past, in consultation with the division director.

Thank you for the opportunity to comment on the Amended Guidelines. We believe that these are positive steps in the right direction. Though we believe more must be done to make this process one that banks are confident will merit using, we are grateful for the Board’s attention to this issue. Should you have any questions, please do not hesitate to contact the undersigned at skern@aba.com or (202) 663-5253.

Sincerely,

A handwritten signature in black ink that reads "Shaun Kern". The signature is written in a cursive, flowing style.

Shaun Kern
Senior Counsel
Office of Regulatory Policy

Enclosure: ABA letter to FRB Governor Randall Kroszner regarding the FRB’s examination appeals process. (January 30, 2008).

²⁰ See Amended Guidelines at 8,393.

²¹ See Amended Guidelines at 8,394.



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January 31, 2008

The Honorable Randall S. Kroszner
Governor
Federal Reserve Board
Eccles Board Building
20th and C Streets, N.W.
Mail Stop 53
Washington, D.C. 20551

Dear Governor Kroszner:

One of the hallmarks of our bank supervisory system is the program of regular bank examinations and evaluations. While for the most part bank exams follow carefully established exam guidelines, by their nature they must involve an irreducible element of judgment, and allowance must be made for a justifiable degree of difference of opinion. Having said that, this element of judgment must also comprehend an effective avenue for appeal when a bank believes that differences of opinion exceed tolerable limits.

On behalf of the members of the American Bankers Association (ABA),¹ we are writing to request that your agency review its examination appeals process to determine whether changes could be made that would improve the process and assure that a meaningful avenue for redress exists.

We note at the outset that there is no question about the professionalism exhibited by your agency in the examination process. However, there have been, and will inevitably be, circumstances where a bank believes it has been unfairly rated by the examination staff. There is a perception that the current formal appeals processes at the federal bank regulatory agencies do not provide a meaningful option for addressing a bank's concerns about a supervisory determination.

While few of our members have appealed such a determination, the small number of appeals filed to date should not be interpreted as a sign that all is well with the process. Rather, it is more likely a reflection of the fact that banks do not believe appealing a supervisory determination is a worthwhile exercise from a cost-benefit

¹ The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$12.7 trillion in assets and employ over 2 million men and women.

standpoint. Several members with whom we have spoken have declined to appeal supervisory determinations because of concerns about examiner retribution. Others have expressed little confidence that an appeal would result in any positive change. This clearly is unacceptable to banks and, no doubt, to the agencies as well.

The importance of a fair and effective appeals process has increased now that deposit insurance premiums depend, in part, on a bank's CAMELS ratings. There is a financial cost associated with any downgrade and a financial savings associated with an upgrade. Given that this assessment system is now in place, we urge that the appeals process be reviewed and improved.

ABA respectfully requests that your agency consider the following recommendations:

- We urge you to establish an initial process that is less formal than the current process spelled out in your agency's rules. Toward this end, we believe an enhanced role for your office of ombudsman could be constructive. The position of ombudsman was created by legislation in 1994 to serve the role of facilitator and mediator. We encourage each agency to involve an ombudsman in appeals of exam findings² for these purposes as well as for the purpose of reviewing and, if necessary, suspending or perhaps even overturning an examiner's findings.
- In order for this enhanced role of the ombudsman to be effective, we recommend that the office have the following characteristics:
 - **Independence.** The ombudsman should function outside the supervision area and report directly to the head of the agency.
 - **Authority.** The ombudsman should have the right to suspend or overrule any decision made by examiners, subject only to the final determination by head of the agency. The Ombudsman also should have the authority to conduct an independent review of post-exam surveys to identify trends, differences between regions, and problems that might lead to disputes in the future.
 - **Expertise.** The ombudsman should be sufficiently expert to earn the trust of his or her agency. Thus, the ombudsman should be a seasoned professional, such as a senior-level commissioned examiner. The ombudsman's office also should have the ability to use other agency experts as needed, including lawyers, accountants, or economists.
 - **Communication.** The ombudsman should communicate candidly and, where appropriate, confidentially with the institution filing an appeal. Once an appeal is filed, the ombudsman should provide the examiner and the bank the full opportunity to present any information either side deems relevant.
 - **Review.** The ombudsman should follow up with the bank at stated intervals – perhaps 6 months following the resolution of an appeal and again following the next examination – to see if the bank perceives any examiner retribution. Reports on the findings of such reviews should be provided by the ombudsman to the head of the agency and the head of supervision. Of course, if retribution

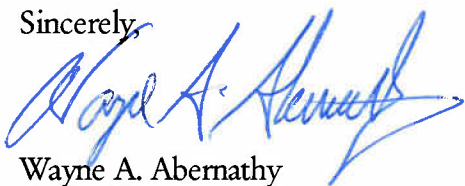
² We recognize that certain matters, such as decisions to place an institution into receivership or conservatorship, formal rulemakings conducted under the Administrative Procedures Act, or matters subject to judicial review, are not appropriate for consideration by the ombudsman. The suggestions that follow in this letter would apply to the universe of matters that would be appropriately appealable to an ombudsman, especially examination ratings.

is found, appropriate steps should be taken by the agency to address that issue.

- If a matter is not resolved through the less formal process, the bank in question should have the opportunity to file a formal appeal. We recommend that such an appeal be made to a permanent review board at the district or regional level. We recommend further that this board be composed of individuals who are completely independent from anyone who made or reviewed the initial material supervisory determination and who are outside the reporting chain of those making or reviewing the determination. As with informal appeals, there should be follow-up communications with the bank following a formal appeal to see if there are indications of examiner retribution.

We believe the steps outlined above would go far in promoting not only a more effective appeal process but also one that is perceived as being effective. This would make it likelier that the agencies would receive better and more candid feedback about the examination process and findings from the institutions you regulate. This issue of the adequacy of the appeals processes is one that our members will be following closely, and we stand ready to work with you on this issue to provide whatever assistance we can.

Sincerely,



Wayne A. Abernathy
Executive Vice President
Financial Institutions Policy
and Regulatory Affairs

cc: Treasury Assistant Secretary David Nason